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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954

No. [redacted] 55

STATE OF NORTH CAROLINA, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL., *Appellees*.

Appeal From the United States District Court for the Eastern District of North Carolina

MOTION TO AFFIRM

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IN THE

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October Term, 1954

No. 757

STATE OF NORTH CAROLINA, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL., *Appellees.*

Appeal From the United States District Court for the Eastern District of North Carolina

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the railroad appellees move that the judgment of the District Court be affirmed on the ground that the questions raised by appellants are so unsubstantial as not to need further argument.

This is a direct appeal from a final judgment entered on February 11, 1955, by a specially constituted three-judge District Court pursuant to Sections 1336, 2321 to 2325 of Title 28 of the United States Code, dismissing the suit of the plaintiffs and intervening plaintiffs to set aside and enjoin an order of the Interstate Commerce Commis-

sion entered in proceedings entitled "Docket No. 31479, *North Carolina Intrastate Freight Rates and Charges,*" 293 I.C.C. 541. The case below is reported in 128 Fed. Supp. 718. Appellants' jurisdictional statement was filed April 28, 1955.

The aforesaid order of the Commission required the railroads operating in the State of North Carolina to increase their intrastate freight rates, with a few exceptions, by the amounts or percentages by which they had increased their interstate rates on the same commodities pursuant to authority granted by the Commission in Ex Parte No. 175, *Increased Freight Rates, 1951,* 280 I.C.C. 179, 281 ICC. 557, 284 I.C.C. 589, 289 I.C.C. 395.

THE QUESTIONS PRESENTED

Appellants contend that this appeal presents four questions which are of sufficient importance to warrant the filing of briefs and oral argument before this Court. These questions, as propounded by appellants, are:

1. Under what circumstances may the Interstate Commerce Commission fix the rates to be charged by railroads for the transportation of intrastate freight?

2. Is there substantial evidence in the record as a whole to sustain the finding of the Interstate Commerce Commission that the North Carolina intrastate freight rates, without the Ex Parte No. 175 increases, result in unjust discrimination against interstate commerce?

3. Is there substantial evidence in the record as a whole to sustain the finding of the Interstate Commerce Commission that the aforesaid intrastate freight rates result in undue advantage, preference, or prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand?

4. May the Interstate Commerce Commission require intrastate rates to be increased if no increase is sought from State authorities, or by more than the increase sought?

We shall answer these questions in the order stated above, which is the order in which appellants have stated them. But at the very outset we desire to emphasize the fact that the questions posed by appellants are primarily questions of fact. This is apparent as to the questions numbered 2 and 3, which are the ones stressed in the jurisdictional statement. The question numbered 1 is not discussed as such in that statement, and the question numbered 4 is not only without basis in fact but, as the District Court points out, has been decided adversely to appellants by this Court and the lower federal courts (128 Fed. Supp., 724-725). It is thus clear that this appeal presents no important question of law which requires determination by this Court. The question presented is merely whether the evidentiary facts found by the Commission, which appellants admit are supported by the evidence, are sufficient to support its ultimate findings (128 Fed. Supp., 721). It is not contended that the ultimate findings, if supported by the evidentiary findings, are insufficient to support the order.

STATEMENT OF THE CASE

The case is stated in the report of the Commission and the opinion of the District Court and no detailed statement is necessary here. It is believed that the following summary may prove helpful:

1. Ex Parte No. 175 is the latest of several post-war proceedings in which the Interstate Commerce Commission found that, in order to effectuate the National Transportation Policy and the rule of rate making stated in Section 15a(2) of the Interstate Commmerce Act (49 U.S.C. preceding Section 1 and Section 15a(2)), it was necessary for the railroads of the country to increase their freight rates and charges (284 I.C.C. 589).

2. The need for increased freight rates and charges was brought about by large increases in the railroads' operating expenses, due particularly to increases in the wages

of their employees, increases in the cost of materials and supplies used by them, increased taxes, and to enable them to obtain and service the capital needed to maintain at all times a transportation system adequate for the needs of commerce, the Postal Service, and the national defense (284 I.C.C. 589, 293 I.C.C., 548, 558).

3. The increased operating expenses which made increased rates necessary affected both interstate and intrastate transportation. The Interstate Commerce Commission, therefore, requested a committee of state commissioners to sit with it during the hearings in Ex Parte No. 175 and, in determining the measure of the increases to be authorized, proceeded on the assumption that said increases would be applied on both interstate and intrastate traffic. They were applied on intrastate traffic in nearly all states (293 I.C.C., 558).

4. After the Interstate Commerce Commission authorized the Ex Parte No. 175 increases on interstate traffic, the railroads applied to the North Carolina Utilities Commission to authorize the same increases on intrastate traffic within that state. By order of July 9, 1953, which by its terms expired on February 28, 1954, the same date that the Interstate Commerce Commission's order expired, the North Carolina Commission authorized the carriers to increase their intrastate rates by the amounts of the Ex Parte No. 175 increases, subject to a few exceptions[1] (293 I.C.C., 543).

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[1] The increases finally authorized by the Interstate Commerce Commission in Ex Parte No. 175 were generally 15 per cent and these were the increases authorized by the North Carolina Commission's order of July 9, 1953, with a few exceptions. The exceptions were fertilizer and fertilizer materials, no increase; sand, gravel, chert, slag, crushed stone or granite, slate cinders and clay or shale cinders, 6 per cent; asphalt, 9 per cent. The Interstate Commerce Commission and the North Carolina Commission had previously authorized lesser interim increases, but it is not thought necessary to detail these increases.

5. The State of North Carolina appealed from its Commission's order to the Superior Court of Wake County. On October 10, 1953, while the appeal was pending, the Interstate Commerce Commission extended the Ex Parte No. 175 increases to December 31, 1955. On January 21, 1954, the carriers petitioned the North Carolina Commission for authority to establish on March 1, 1954, and to maintain until December 31, 1955, the same rates as authorized in its order of July 9, 1953, to coincide with the expiration date of the Interstate Commerce Commission's order (293 I.C.C., 543).

6. Shortly before the hearing of the carriers' petition of January 21, 1953, the Superior Court entered a judgment reversing the North Carolina Commission's order of July 9, 1953. "Substantially, this judgment rested upon the grounds that the railroads had failed to show the revenue received and the operating expenses incurred in the conduct of their intrastate business" and, therefore, had failed to comply with the requirements of a state statute. The North Carolina Commission felt bound by the aforesaid judgment and denied the carriers' petition of January 21, 1954. The effect of the denial was to prohibit the carriers from charging or collecting the Ex Parte No. 175 increases on North Carolina intrastate traffic after February 28, 1954 (293 I.C.C., 543-544).

7. Upon denial of their petition of January 21 by the North Carolina Commission, the railroads sought no further relief with respect to intrastate rates from that Commission or from the state courts, but on March 10, 1954, filed a petition with the Interstate Commerce Commission to institute an investigation under Section 13 of the Act (49 U.S.C. Section 13(3)(4)). The Interstate Commerce Commission, after a full hearing, found that the failure to increase the intrastate rates on North Carolina traffic by the amounts of the Ex Parte No. 175 increases resulted in both unjust discrimination against interstate commerce and, except as to road aggregates, un-

due prejudice and preference as between persons and localities in interstate and intrastate commerce. Based on its findings, the Interstate Commerce Commission issued an order requiring the railroads to make said increases (293 I.C.C., 541, 544). This is the order upheld by the unanimous decision of the three-judge District Court.

We shall now discuss the points which appellants say are involved in this appeal.

THE CIRCUMSTANCES UNDER WHICH THE INTERSTATE COMMERCE COMMISSION MAY PRESCRIBE INTRASTATE RATES ARE WELL SETTLED

Sections 13(3)(4) and 15a(2) were made parts of the Interstate Commerce Act by the Transportation Act, 1920.[3] Since that time, these sections of the Act have been before this Court in numerous cases in which the Court has clearly stated the scope and meaning of the sections and the circumstances under which they authorize the Interstate Commerce Commission to prescribe intrastate rates. Some of these cases are: *Wisconsin R. R. Comm.* v. *C. B. & Q. R. Co.*, 257 U.S. 563; *New York* v. *United States*, 257 U.S. 591; *Georgia Public Service Comm.* v. *United States*, 283 U.S. 765; *Louisiana Public Service Comm.* v. *T. & N. O. R. Co.*, 284 U.S. 125; *Florida* v. *United States*, 282 U.S. 194; *Florida* v. *United States*, 292 U.S. 1; *United States* v. *Louisiana*, 290 U.S. 70; *Illinois Commerce Commission* v. *United States*, 292 U.S. 474; *North Carolina* v. *United States*, 325 U.S. 507; *King* v. *United States*, 344 U.S. 254; *Northern Pacific R. Co.* v. *Montana*, 344 U.S. 905; *Tennessee* v. *United States*, 346 U.S. 891; *Louisiana Public Service Comm.* v. *United States*, 348 U.S. 885; *Illinois Central R. Co.* v. *Mississippi Public Service Comm.*, 349 U.S. 908.

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[3] Section 15a(2) has been changed since its enactment in 1920, but the changes emphasize the duty of the Commission to prescribe rates which will give the carriers adequate revenue. *Florida* v. *United States*, 292 U.S. 1, 6-8.

Many of these cases involved the authority of the Interstate Commerce Commission to require intrastate rates to be increased by the amounts of general increases authorized by the Commission in interstate rates, in so-called general revenue cases, in order to maintain the adequate and efficient national transportation system required by the National Transportation Policy and the rule of rate making stated in Section 15a(2) of the Interstate Commerce Act. The *Wisconsin* and *New York cases, supra,* involved the question of the Commission's authority to require the intrastate passenger fares in those states to be increased to the level of the interstate passenger fares, as authorized in Ex Parte No. 74; *United States* v. *Louisiana, supra,* involved the Commission's authority to require the intrastate freight rates in Louisiana to be increased by the amounts authorized in Ex Parte No. 103; *King* v. *United States, supra,* involved the Commission's authority to require the intrastate freight rates in Florida to be increased by the amounts of the Ex Parte Nos. 162 and 166 increases; *Tennessee* v. *United States, supra,* involved the Commission's authority to require the Tennessee intrastate freight rates to be increased by the amounts of the Ex Parte Nos. 166 and 168 increases; and the recent *Louisiana* and *Mississippi cases, supra,* involved the authority of the Commission to require the intrastate freight rates in those states to be increased by the amounts of the Ex Parte No. 175 increases, the same increases that are involved in the instant case. It is thus apparent that this Court many times has considered and determined the circumstances under which the Interstate Commerce Commission may require intrastate rates to be increased by the amounts by which interstate rates have been increased in general revenues cases.

King v. *United States, supra,* was decided December 22, 1952, and is the latest case of this kind in which the Court felt it necessary to hear argument and render an opinion. There, speaking through Mr. Justice Burton, the Court discussed at considerable length both the findings of the Com-

mission which are necessary to support an order requiring an increase in intrastate rates and the evidence needed to support those findings. The Court also discussed and found to be without merit various contentions of the appellants in that case which are the same as the contentions of the appellants in the instant case (254 U.S., 267-276). The learned District Court regarded the decision in the *King case* as controlling in the instant case. After quoting the Commission's findings in the instant case, the Court said (128 Fed. Supp., 722):

> "The findings were in essence the same as those made by the Commission which were before the Supreme Court and were held sufficient to sustain the Commission's order in King v. United States, 344 U.S. 254, 73 S. Ct. 259, 97 L. Ed. 301. * * * * As similar findings were made here and as they are unquestionably supported by the evidence, there would seem to be little need of further discussion."

THE COMMISSION'S FINDINGS ARE SUPPORTED BY THE EVIDENCE

We have the findings of the Interstate Commerce Commission that the refusal of the state authorities to permit the Ex Parte 175 increases[3] results in unjust discrimination against interstate commerce and persons-localities preference and prejudice. And we have the statement of the District Court that the findings of the Interstate Commerce Commission "are unquestionably supported by the evidence." In addition, appellants do not contend that the Commission's "finding of evidentiary facts is not amply supported by the evidence in the case" (128 Fed. Supp., 721). In these circumstances, it is apparent that no elaborate discussion of the evidence is necessary.

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[3] The Interstate Commerce Commission required an increase of 12 per cent, instead of 15 per cent, to be applied to the North Carolina interstate rates "on cinders, coal; cinders, clay or shale (Haydite); cinders, slate; coal ashes; and slag, expanded, in open-top cars" (293 I.C.C., 560).

A—The Findings With Respect to Unjust Discrimination Against Interstate Commerce

Finding 1 that "the conditions incident to the intrastate transportation of freight in North Carolina are not more favorable than those incident to the interstate transportation in North Carolina and in adjoining States" is supported by what is said in the Commission's report under the heading *"Intrastate Operating Conditions"* (293 I.C.C., 548).

Finding 2 is that "the amounts and percentages by which interstate freight rates and charges between points in North Carolina and points in other states were increased, as authorized in Ex Parte No. 175, are just and reasonable." This finding is not assailed in the instant case and is supported by the Commission's reports and findings in Ex Parte No. 175, *Increased Freight Rates,* 1951, 284 I.C.C. 589, 289 I.C.C. 395. The Commission was justified in relying upon those findings in the instant case. *Georgia Public Service Comm.* v. *United States,* 283 U.S. 765, 769-770.

Finding 3 includes several findings which may properly be considered separately.

(a) The North Carolina intrastate rates required to be increased are "abnormally low." This finding is supported by what is said in the Commission's report under the heading *"Economic Conditions"* (p. 545), *"Intrastate operating conditions"* (p. 548), *"Rate Relationships"* (pp. 549-552), and also by its evidentiary findings with respect to the rates on various commodities (pp. 552-557).

(b) Intrastate traffic moving under the aforesaid rates "fails to produce its fair share of the earnings required" by Section 15a and the National Transportation Policy. This finding is supported by what is said in the Commission's report under the heading *"Respondents' Property Investment and Revenue"* (pp. 545-548). It is also supported by the statement of the District Court (128 Fed.

Supp., 723) that the Commission "showed that if intra state rates had been adjusted to include the full effect o the Ex Parte No. 175 increases, the total revenues fo 1953 of the principal railroads i.e. the N. & S., the S. A. L the Southern and the Coast Line would have been $509, 787,029 and their North Carolina intrastate revenue $11, 265,176, a ratio of 2.20%. This was contrasted with thei freight revenue for the year 1947, the only post-war yea in which increases were granted simultaneously by th Interstate Commerce Commission and the North Carolin Commission. In that year the ratio was 2.264%. It thu appears that, even with the increases asked, the ratio o intrastate to interstate revenue would be less than i 1947."

(c) "the burden thus cast upon interstate commerce i undue in and to the extent that these intrastate rates an charges are less than they would be on the basis herei prescribed." The basis prescribed, except where a lowe basis was fixed, was that maintained by the carriers un der the authority granted in Ex Parte No. 175 (see Findin 5). This finding is supported by the evidentiary finding already cited, which support Findings 1 and 3(a) and (b)

(d) The North Carolina intrastate rates required to b increased "cause, and for the future will cause, undue, un reasonable, and unjust discrimination against interstat commerce." The evidence supporting this finding is s well stated by the District Court that we quote what i said (128 Fed. Supp., 722):

> "Plaintiffs contend that there was no sufficien showing of discrimination against interstate commerc and in favor of intrastate commerce resulting fro the intrastate rates. It appears, however, that, witl out the Ex Parte No. 175 increases on any of thei traffic in 1953, the return on net investment in 195 for the four principal carriers receiving 87% of th intrastate revenue would have been 0.94% for th Norfolk Southern, 4.63% for the Seaboard, 4.35% fo the Southern and a deficit of more than $4,000,000 fo

the Atlantic Coast Line, or a combined return for the four roads of 2.84%. This is not a case, then, as plaintiffs argue, where an unnecessary increase was granted in a prosperous territory because of a need in other sections. The need for increase existed in North Carolina as these figures show, and the Commission estimated that the total loss from the non-application of the increase in 1953 was $1,500,000. As the cost of handling intrastate freight was shown to be as great as or greater than the handling of interstate freight, the raising of interstate rates without raising intrastate rates necessarily resulted in throwing an undue share of the cost of the service upon interstate transportation."

Finding 5 requires the unjust discrimination against interstate commerce to be removed by increasing the North Carolina intrastate rates by the increases maintained on the interstate rates to, from, and between points in North Carolina under the authority granted in Ex Parte No. 175, except where smaller increases are authorized. As already pointed out, this finding is supported by the evidentiary findings which support Findings 1 and 3(a)(b). Moreover, as this Court stated in *King* v. *United States, supra,* at page 272:

> "The Commission has applied to the Florida operations the same conclusion it reached as to the need for increased revenue on a national basis and has distributed the burden within Florida along the same lines it followed when estimating the revenues available in the southern territory from intrastate as well as interstate operations. In the absence of any showing that it is not applicable to Florida, the evidence which forms the basis of the Commission's nationwide order becomes the natural basis for its Florida order."

Finding 6 is to the effect that the North Carolina intrastate rates, increased as required, will not be unreasonable in themselves or in relation to the interstate rates, and will increase the carriers' revenues by at least $1,300,000 per year.

On page 549 of its report, the Commission points out that "none of the rates on classes or commodities applicable in North Carolina, if subjected to the increases here sought, would be on a higher level than the interstate rates to or from North Carolina points for corresponding distances." The increases required were the same as or less than those sought (Finding 5). This fact, together with the evidentiary findings supporting Findings 1, 2, 3(a), and 3(b), amply support the Commission's finding that the intrastate rates, as increased, will not be unreasonable in themselves or in relation to the interstate rates.

On page 547 of its report, the Commission states that "the total North Carolina intrastate revenue earned in 1953 by all 30 railroads operating in the State amounted to $12,173,123, and the total estimated loss from nonapplication of the increases here sought approximates $1,500.00." This statement is based upon an actual traffic test and upon the testimony of responsible traffic officials of the railroads (293 I.C.C., 557; Exs. 16, 34, and 43). And, although they changed their minds on brief, "the state of North Carolina and the Department of Agriculture of the state admitted in their answer to respondents' petition herein that increasing the intrastate rates as requested would add $1,500,000 each year to the cost of such service * * *" (293 I.C.C., 557).

Finding 7 is that the increased revenues to be derived from the increased rates "are required from intrastate traffic in North Carolina in order to enable the respondents to provide adequate and efficient railway transportation service." This finding is supported by what is said under the heading *"Respondents' Property Investment and Revenue"* (293 I.C.C., 545-548) and by the fact that "even with the increases * * *, the ratio of intrastate to interstate revenue would be less than in 1947," the only post-war year in which increases became effective interstate and intrastate in North Carolina at the same time (128 Fed. Supp., 723).

In view of what has been said, it is plain that the Commission's order requiring the North Carolina intrastate rates to be increased to remove unjust discrimination against interstate commerce is supported by the evidence, as well as by adequate findings.

B—The Findings With Respect to Persons-Localities Preference and Prejudice

It should be pointed out that the Commission's order requiring the North Carolina intrastate freight rates to be increased by the amounts of the Ex Parte No. 175 increases is valid if either the finding of unjust discrimination against interstate commerce or the finding of persons-localities preference and prejudice is supported by the evidence. This is so because Section 13(4) of the Interstate Commerce Act prohibits and declares to be unlawful intrastate rates which result in either unjust discrimination against interstate commerce or in "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand." *King* v. *United States, supra,* p. 269, note 14. The section also gives the Commission authority to prescribe the intrastate rates necessary to remove either unjust discrimination against interstate commerce or persons-localities preference and prejudice.

Finding 4 in the instant case relates specifically to persons-localities preference and prejudice. In this finding, the Commission concluded that:

(a) "Except as to road aggregates, there is active competition between persons and localities engaged in interstate commerce moving to and from points in North Carolina, on the one hand, and persons and localities engaged in intrastate commerce in North Carolina, on the other hand;"

Since the existence of the above-stated competition is admitted by appellants in their jurisdictional statement (p.

7), it is not necessary to refer to the evidence or the evi dentiary findings in the Commission's report which sustai this finding.

(b) "this competition extends throughout the State o North Carolina and to freight traffic generally."

This finding is supported by what is said at pages 549 557 of the Commission's report. The Commission ther found, among other things (pp. 549-550):

> "Actual movements, both interstate and intrastat of numerous less-than-carload shipments of the sam class-rated commodities to common North Carolin destinations in the period March 15 to April 3, 195 emphasize the existing disparity. A typical example i of a shipment of furniture rated class 125, from Moun Airy, N. C., to Asheville, N. C., 211 miles, on which th intrastate rate was $1.95. A similar shipment of furni ture from Augusta, Ga., to the same destination, 19 miles, was charged a rate of $1.85 plus the 15 percen increase, or $2.13. Whereas the Augusta shippe formerly had an advantage of 10 cents when shippin to Asheville, the nonapplication of the Ex Parte N 175 increase on the intrastate rate has resulted in differential of 18 cents against him. Increasing th intrastate rate as here sought would again place Au gusta, because of its natural geographical advantag in the relative competitive position it formerly held.
>
> "The volume of less-than-carload traffic moving i interstate commerce is materially greater than tha moving intrastate. In this same period, from Marc 15 to April 3, respondents Atlantic Coast Line, Norfol Southern, and Southern Railway transported 3,44 intrastate and 27,625 interstate less-than-carload ship ments to 131 different common destinations in all part of North Carolina to which there were 5 or more ship ments.
>
> "Many commodities also move in carload quantitie from origins in North Carolina and other States t destinations in North Carolina. Thus, in the perio March 15 to April 3 the Atlantic Coast Line, Norfol Southern, and Southern terminated 6,873 intrastat and 7,307 interstate carload shipments of 60 commodi

ties at destinations throughout the State. In the year 1953 the Seaboard Air Line handled 39,296 carloads of intrastate traffic between points in North Carolina, consisting of 96 different commodities. All of these commodities, with the single exception of ice, also moved from or to North Carolina points in interstate commerce, the volume of such interstate traffic aggregating 146,603 carloads."

After referring to certain specific examples of undue preference and prejudice set forth in the Commission's report, the District Court stated (128 Fed. Supp., 723):

"Countless other illustrations of undue discrimination against out of state shipping points as a result of the disparity between interstate and intrastate rates will occur to anyone familiar with the movement of commerce within the state".

(c) "the existing disparities between the current interstate and intrastate freight rates results in undue preference of and advantage to persons and localities in North Carolina in intrastate commerce and undue prejudice of and disadvantage to person and localities in interstate or foreign commerce."

This ultimate finding or conclusion is supported by the following excerpt from the Commission's report (p. 559):

"As stated, the record shows the movement of intrastate and interstate carload and less-than-carload shipments, made during a representative period to common North Carolina destinations, of a wide variety of commodities, including all of those moving in important volume, at both the class and the commodity rates here in issue and their counterpart in interstate commerce. When, as here, there is a substantial disparity between intrastate rates and reasonable interstate rates contemporaneously applied under substantially similar transportation conditions, coupled with a showing of competition between interstate and intrastate rates as indicated by actual shipments which moved to common destinations under the intrastate and interstate rates, there arises the unjust discrimi-

nation against interstate commerce and the undue prejudice to persons or localities in interstate commerce which the act declares to be unlawful. The single exception to the foregoing are the rates on road aggregates, as to which, for the reasons above set out, the record is inadequate to support a finding of undue prejudice and preference as between persons or localities."

In the *Wisconsin Case, supra,* this court held that a finding of persons-localities preference and prejudice, state wide in scope, could not be sustained where the evidence showed discrimination at border points only (257 U.S., 579-580). See also *Florida* v. *United States,* 282 U.S. 194, 205-208. In the instant case, the evidence shows that there is a movement of all sorts of commodities, carload and less-than-carload, from interstate and intrastate origins to points throughout the State of North Carolina. This showing, coupled with the showing of competition between interstate and intrastate shippers, a marked difference between the interstate and the intrastate rates, the total lack of justification for any such difference, and the reasonableness of the interstate rates, amply supports the Commission's finding of state-wide preference and prejudice and the order requiring its removal. The learned District Court so held and its holding is supported by this Court's decisions in *Georgia Public Service Comm.* v. *United States,* 283 U.S. 765, and *Louisiana Public Service Comm.* v. *T. & N. O. R. Co.,* 284 U.S. 125.

THE CONTENTION THAT THE RAILROADS DID NOT ASK THE STATE AUTHORITIES FOR PERMISSION TO INCREASE THEIR RATES ON CERTAIN COMMODITIES, AND THAT CONSEQUENTLY THE INTERSTATE COMMERCE COMMISSION HAD NO AUTHORITY TO REQUIRE INCREASES IN THE RATES ON SAID COMMODITIES, IS WITHOUT MERIT

The contention stated in the heading is based on the fact that in their petition of January 21, 1954, the carriers did not ask for authority to increase the intrastate rates

on the commodities upon which the North Carolina Commission had declined to authorize the full amounts of the Ex Parte No. 175 increases by its order of July 9, 1953 (Jurisdictional statement, pp. 4-5 and 16). But, as we have already pointed out, the order of July 9, 1953, was scheduled to expire on February 28, 1954, and the petition of January 21, 1954, was filed for authority to establish on March 1, 1954, and to maintain until December 31, 1955, the same increases as authorized by the order of July 9, 1953. It was necessary to secure prompt action on the petition of January 21, 1954, otherwise the carriers' authority to charge any of the Ex Parte No. 175 increases would expire, and there was insufficient time to relitigate before the North Carolina Commission the question of their right to the full amounts of the Ex Parte No. 175 increases on the excepted commodities. *They had requested the full amounts of said increases on all commodities in their petition of June 2, 1952, to the North Carolina Commission and that request has never been withdrawn* (293 I.C.C., 543-544).

What has been said plainly shows that the carriers did not ignore the North Carolina Commission and it is significant that that Commission is not a party to this case and is not complaining of anything the railroad appellees did or left undone. Moreover, the carriers' failure to ask the North Carolina Commission a second time to authorize increases it had previously denied cannot possibly affect the authority of the Interstate Commerce Commission to require the rates on said commodities to be increased by the full amounts of the Ex Parte No. 175 increases.

Section 13(3) of the Interstate Commerce Act authorizes the Commission to require any intrastate rates "made or imposed by authority of any State" to be increased to the extent necessary to remove unjust discrimination against interstate commerce or persons-localities preference and prejudice. The intrastate rates on the commodities as to which the North Carolina Commission had refused to authorize the full amounts of the Ex Parte No. 175 increases were unquestionably made or imposed by state authority

and that was all that was necessary to give the Intersta Commerce Commission authority to require those rates be increased. *Florida* v. *United States*, 282 U.S. 194, 21 *State of Illinois* v. *United States*, 101 Fed. Supp. 36, 4 affirmed in 342 U.S. 930, reh. den. 343 U.S. 911; *State United States*, 128 Fed. Supp. 718, 724.

OTHER CONTENTIONS OF APPELLANTS ARE PLAINL WITHOUT MERIT

Appellants make certain other contentions which hav no merit.

1. Appellants' principal contention is that the evidenc of record does not support the Commission's findings b cause it does not show the value of the railroads' pro erties in North Carolina devoted to the transportation intrastate freight and the return they earned on that valu from the transportation of such freight (Jurisdiction statement pp. 7-9).

This same contention was made before the Commissio and in the District Court, and was rejected by both. Th Commission, citing several of this Court's decisions an decisions of its own, concluded that it would have bee "impracticable" for the railroads to attempt to make suc a separation of revenues, values, and operating expense and that such evidence "would serve no useful purpose (293 I.C.C., 557-558). The District Court reached the sam conclusion (128 Fed. Supp., 723-724). The conclusion supported by *Illinois Commerce Commission* v. *Unite States*, 292 U.S. 474, 483-484; *King* v. *United States*, 34 U.S. 254, 273, and the cases therein cited.

2. Appellants also contend that the evidence is insuff cient in that it fails to show that the railroads "are n now rendering adequate and efficient service," or that th increases the Commission required will result in improve service (Jurisdictional statement p. 7). But surely th Commission is not required to wait until rail service

inadequate and inefficient before it can authorize such increases in rates as it finds to be necessary to produce the revenue the carriers need or before it can require intrastate traffic to contribute its "fair proportionate share" of the needed revenue. See *Increased Freight Rates,* 1951, 289 I.C.C. 395, 440. Moreover, the Commission's reports in Ex Parte No. 175, and the other proceedings in which general rates increases have been authorized, show that said increases have enabled the railroads greatly to improve their service. See *Increased Freight Rates,* 1951, 281 I.C.C. 557, 590. See, also, Finding 1.

3. Appellants contend that the railroads operating in North Carolina do not need additional revenue, and rely upon recent improvements in their financial condition to support that view (Jurisdictional statement, pp. 10-11). But it cannot be denied that the need of the railroads for additional revenue is primarily a matter for the Interstate Commerce Commission to determine. If this were not true, the Commission would be wholly unable to perform the duties imposed upon it by the National Transportation Policy and Section 15a(2) of the Interstate Commerce Act. When the evidence shows that the combined rate of return of the four principal North Carolina railroads was only 5.10 per cent in 1953 and without the Ex Parte No. 175 increases would have been only 2.84 per cent, the Commission's finding that they need the additional revenue which will be produced by applying the Ex Parte No. 175 increases to their intrastate rates is not open to review (293 I.C.C., 546; 128 Fed. Supp., 722).

4. Appellants say that since the difference between the interstate and the North Carolina intrastate rates does not prevent interstate shippers from shipping into North Carolina, there is no basis for the Commission's finding of persons-localities preference and prejudice. This same contention has been made in other cases under Section 13 of the Act and found to be without merit. Thus, in *Increases*

in Tennessee Freight Rates and Charges, 272 I.C.C. 625, the Commission pointed out, at page 643:

> "The belief that no discrimination or injury can occur when goods are sold in Tennessee notwithstanding the freight charges, or when the products of manufacturers, producers, or distributors that were formerly disposed of in Tennessee are absorbed by other markets, is erroneous. It is the right of a shipper to choose his market. Unnatural and unwarranted barriers to such a choice are prejudicial."

See also *Northeast Kentucky Coal Bureau* v. *C. & O. Ry. Co.,* 206 I.C.C. 445, 448, order sustained in *Chesapeake and Ohio Railway Co.* v. *United States,* 296 U.S. 187.

5. Finally, appellants contend that the instant case should be briefed and argued before this Court because of an alleged conflict between the decision of the District Court in the instant case and the decision in *Mississippi Public Service Commission* v. *United States,* 124 Fed. Supp. 809, (Jurisdictional statement, p. 16). Actually, there is no conflict.

In the *Mississippi case,* the three-judge District Court found that the Commission's order was not supported by the evidence and issued an injunction setting it aside. In the *Louisiana case,* (*Louisiana Public Service Commission* v. *United States*) 125 Fed. Supp. 180, the three-judge District Court found that the Commission's order was supported by adequate findings and by the evidence and refused to set it aside. In one case the Commission's order required the intrastate rates in Mississippi to be increased by the Ex Parte No. 175 increases and in the other required the intrastate rates in Louisiana to be increased by said increases. The Court granted a motion to affirm in each case (349 U.S. 908; 348 U.S. 885). The fact that a motion to affirm was granted in each case shows that since numerous decisions have established the extent of the Commission's authority under Section 13 of the Act, this Court will not ordinarily undertake to review voluminous

evidence to determine whether or not it supports the Commission's findings.[4]

It is manifest that the instant case is one in which it is unnecessary for this Court to undertake the laborious task of reviewing the evidence for the purpose of determining whether or not it supports the Commission's findings. Every administrative and judicial tribunal which has considered the evidence, not excluding the North Carolina Commission, has concluded that it justifies an increase in the North Carolina intrastate rates by the amounts of the Ex Parte No. 175 increases.

CONCLUSION

In *Ohio* v. *United States*, 292 U.S. 498, 506, which was a proceeding under Section 13(3)(4) of the act, the Court said:

> "In effect, we are asked to re-examine the evidence, appraise it, and hold the Commission erred in its judgment as to the facts. We have often said that we have no such power."

The appellants are here asking the Court to assume responsibility for primary review of administrative orders normally falling within the function assigned to the three-judge court (*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474) and also to substitute its judgment for that of the Commission on matters of fact which have been entrusted to the special competence and expertise of the Commission. Since the Court has held that it has no such power and the other contentions made by appellants are without merit, it follows that a motion to affirm should be granted.

Wherefore, the premises considered, the railroad apel-

[4] The evidence in the instant case consists of 772 pages of testimony and 54 exhibits.

lees pray that the judgment of the three-judge District Court be affirmed.

Respectfully submitted,

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Certificate of Service

I, Henry J. Karison, one of the attorneys for the railroad appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the twenty-seventh day of May, 1955, I served copies of the foregoing Motion to Affirm on the several parties thereto as follows:

1. On the State of North Carolina and intervening plaintiffs by mailing copies, in duly addressed envelopes, with

first-class postage prepaid, to their respective attorneys as follows:

HARRY MCMULLAN, Attorney General,
I. BEVERLY LAKE, Assistant Attorney General,
Attorneys for the State of North Carolina and the North Carolina Department of Agriculture
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BROUGHTON AND BROUGHTON
Attorneys for the North Carolina Farm Bureau Federation, Inc., and the Farmers Cooperative Exchange
Address: Commercial Building,
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2. On the United States of America, by mailing a copy in duly addressed envelopes, first-class postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., to Stanley N. Barnes, Esq., Assistant Attorney General, and Riggs McConnell, Esq., Department of Justice, Washington 25, D. C., and by mailing a copy to Julian T. Gaskill, Esq., United States Attorney for the Eastern District of North Carolina, Room 303, Federal Building, Raleigh, North Carolina.

3. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, first-class postage prepaid, to Edward M. Reidy, Esq., its Chief Counsel, and to Leo H. Pou, Esq., its Assistant General Counsel, at the offices of the Commission, Washington 25, D. C.

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